No. 6836

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator
of the Estate of OMEY E. DYER,
Deceased, and Charles E. DYER, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

HON. CHARLES C. CAVANAH, *District Judge.*

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STATEMENT OF FACTS

Appellant's brief opens dramatically with the statement that Omey E. Dyer, the insured, worked and died—but as to *what* caused his death, appellant, and his evidence, are strangely silent—nor does either claim that his work resulted in his death, so that the cause of death is left to the same speculation and surmise, without basis in evidence, as the alleged existence of total permanent disability before lapse of the policy of War Risk Insurance.

Since the principal question is whether the trial court was justified in directing a verdict for the United States, and this involves a consideration of *all* the evidence, it is not necessary to set out the evidence in a statement only

to repeat it in argument. The Statement in appellant's brief cannot be accepted as complete, however, as illustrated by omission (Brief, p. 13) of all testimony by plaintiff, insured's father, with whom he made his home after discharge, relating to insured's work for three years (Tr. 28-29) and (Brief, p. 14) most of the testimony by insured's "boss" and co-worker during the first three years after discharge, relating to insured's work (Tr. 49-51). On our part we shall earnestly endeavor to discuss fairly and fully *all* of the evidence which appears to be material to the issues.

PRELIMINARY MATTERS

For some reason not clearly understood (unless it be that some implication of government unfairness is sought), appellant has printed in the record a Demand for Production of Papers at Trial, which includes the service record of *plaintiff*, and in his brief (pp. 10-38) claims a demand to produce the service record of the *insured veteran* Omey E. Dyer, and refusal thereof. The plaintiff was *not* the veteran, but the beneficiary of the policy and administrator of the veteran's estate; so far as known, he never served in the World War, never had a service record, and if he had one it was utterly irrelevant in this case, which involved only the physical condition of his son, Omey E. Dyer. Nor was demand made at trial for the records of the veteran; it was for the records of Mr. Dyer, "We have demanded" referring therefore again to the plaintiff (Tr. 26). There was no refusal;

merely a statement that the government had no such record (Tr. 26) and there was no showing then or now that the government did have, nor how it would be relevant if it did, and had produced it.

As to the service record of Omey E. Dyer, the veteran and the insured, we are confident appellant's counsel will not deny, though it is not of record on the appeal, that on January 22, 1932, plaintiff notified defendant he would take the deposition of Hon. Patrick J. Hurley, Secretary of War, or Major General C. H. Bridges, Adjutant General, covering Omey E. Dyer's service, at Washington, D. C., where the records were said to be, on February 2, 1932. Thus he had opportunity to gain the information he sought; if taken, it was not offered by plaintiff, whether unfavorable or not, and if not taken, no reason appears why it was not.

By noticing deposition for Omey E. Dyer's service record, and demanding production of plaintiff's record, it is clear that counsel meant two different records—one, the plaintiff's, he demanded; the other and material one, he did not.

ARGUMENT

THE COURT PROPERLY DIRECTED VERDICT FOR DEFENDANT

The burden of proof in War Risk Insurance cases is upon plaintiff as in all other cases. So-called liberality of construction of the statutes or of the policy does not

justify substitution of sentiment for fact, or surmise, speculation or suspicion for substantial evidence supporting the issues. A plaintiff in this class of case is not relieved in any measure from the requirement that he shall, by substantial evidence, prove that the insured was, in fact, not merely totally disabled, but also permanently totally disabled during the life of the policy, and so remained. Nor is it sufficient to prove a total disability during the policy period, without proof of the permanency thereof, and then prove total disability from some other cause arising after the lapse of the policy, but overlapping the prior disability, even if the latter be proven to be permanent. A succession of totally disabling diseases, some before and some after lapse, do not justify a finding of permanent total disability before lapse, even though the succession continue throughout life. As illustration, one might be totally disabled from measles while the policy was in effect; before recovery, and after lapse, he might break his leg; before recovery from that, tuberculosis to the extent of permanency might develop, but this succession would not constitute permanent disability during the life of the policy. It would not be a continuance of the impairment of mind or body rendering it impossible for the insured to follow continuously a gainful occupation, which existed during the policy period, and against which the policy insured.

> " . . he must, in order to recover, present evidence definite and substantial enough to make the inference which he asks the jury to draw as to his condition

twelve years before, a reasonable one under the facts, *based on probabilities, not possibilities, something more than mere conjecture.*"

" 'Verdicts must rest on probabilities, not on bare possibilities. There is not capacity in any number of the former to create the latter . . . '

"Further, this evidence must not merely show that he was at the time of his discharge totally disabled, but that *he has continued and will continue to be so, not as the result of successive maladies making their onset from time to time, but as a result of the same malady, which then totally disabling, has continued and will continue permanently to be so. . . .*

"The Court erred in refusing to direct a verdict . . . . ."

U. S. v. Crume, 54 F. (2d) 556 at 558 (5th C.C.A.)

" . . . As to the influence of the supposed benevolent purpose of Congress in producing liberality of construction for these war risk contracts, apart from the consideration that courts sit to interpret the law and not to administer benevolence (*U. S. v. LeDuc,* (C. C. A.) 48 F. (2d) 789; *U. S. v. McPhee,* (C. C. A.) 31 F. (2d) 243, 245), a comparison of decisions construing war risk with those construing private disability policies will show very little, if any, difference in liberality of view. . . . "

U. S. v. Martin, 54 F. (2d) 554, 555 (5th C. C. A.)
U. S. v. McPhee, 31 F. (2d) 243, 245, (9th C. C. A.)

With these principles in mind, what disability, to what degree, and with what permanence, affected Omey E. Dyer prior to the lapse of his policy on May 31, 1919? The answer from the evidence is: no one knows.

Never during his lifetime, continuing for 10 years after discharge (Tr. 26), did Omey E. Dyer claim insurance benefits, or ask compensation, though he knew of them (Tr. 40), because of any disability occurring before lapse of the policy, during his service, or at any other time. Not until over a year after his death (Tr. 14) was any claim made for insurance benefits, and this was made by the administrator of his estate (for benefits designed for the veteran's support while living and disabled) and the beneficiary in case of death. Apparently the insured did not regard himself entitled, and went ahead supporting himself and a family acquired in 1923, four years after lapse of the policy (Tr. 54), by following a gainful occupation. He did not even change beneficiary from his father, who sues, to his wife or child, both of whom survived him (Tr. 35).

The foregoing, while negative, is indicative of Omey E. Dyer's own view of his rights and disabilities.

What other evidence was presented of pre-lapse total and permanaent disability? The plaintiff *pleaded* that "in November, 1918, the said Omey E. Dyer was crushed in and about the abdomen by a truck and underwent exposure to the elements and suffered from lack of shelter, food and water" (Tr. 13). But there was no evidence

that this occurred in November, 1918, or at any other time, nor does appellant claim in his brief that he offered any competent evidence to prove this as a fact, nor did he so claim at trial (Tr. 76-81). The most that was shown was that *he told* two physicians in the course of treatment, i. e., as history, and admissible therefore only as such in connection with the doctor's diagnosis, that "he had been injured in service" (Dr. Hunt, Tr. 62), or "injured in France, run over by a truck through here (indicating) over the stomach that way (indicating)" (Dr. Hampton, Tr. 69-70). This, of course, was no evidence of *the fact,* which was in issue and required competent evidence, but only evidence of his having said this. Had it been offered through any other witness than his physician, it would have been inadmissible as hearsay; through his physician treating him, it was admissible, not as proof of the fact of the injury, but as proof only that the physician was *told* this, and took it into consideration in his diagnosis or treatment, about the foundation for which the physician may testify. Hearsay from the mouth of a physician is proof of the telling only, not of the occurrence in fact of what was told, any more than it would be from the mouth of another; and after the evidence of telling is admitted, it does not by some magic grow into evidence of the occurrence itself.

But even if it reach the dignity of evidence that Dyer was run over at some unknown time, there is not one syllable of evidence, even history to his physicians, of what the effect was upon his physical condition, either before

or after lapse of the policy. The physician did not recite even any history from Dyer himself of any effects following the supposed accident, and, assuming the fact, the evidence shows no effects whatever, nor, if any effect, whether total or not, or permanent or not, before lapse of the policy.

Dr. Hampton did testify that being run over by a truck would be sufficient to cause the condition he testified he found, and in his opinion did cause it (Tr. 71, 72, 82), but the difficulty is that his answer was opinion only based upon an assumption of something as a fact which was not proven. Dr. Hunt did not try to make any connection between conditions he found in 1926 and the alleged truck injury, except to speculate that it *may* have occasioned some of them (Tr. 62), nor with any other conditions alleged to exist before policy lapse (Tr. 61-68).

> "A mere guess or statement of a witness, even though a so-called medical expert predicated upon no evidence or statement before the court to show continuity of condition . . . is of no value."
>
> *U. S. v. Lesher,* 59 F. (2d) 53 (9th C. C. A.).

No proof was attempted of the pleaded exposure or suffering from lack of shelter, food and water; nor was any proof offered tending to show the pleaded hernia, hyperthyroidism or pharyngitis; nor the pleaded hypochlorhydria, unless it be the same as hyperacidity found not until 1926 (Tr. 62), and not connected back; nor the

pleaded Ileo Caecal Stasis. Apparently plaintiff pleaded a large part of the medical dictionary, and intended to let defendant, the court and the jury choose whichever met favor.

What other evidence of conditions prior to discharge (the date pleaded by plaintiff as marking beginning total permanent disability and his right to insurance payments) was produced? Well, George Thompson testified that about the first of February, presumably in 1919, he left Fort Douglas Army Hospital in the morning, and Dyer reached there about noon. Evidently he didn't see Dyer until later on a Sunday evening. Dyer was in bed and could hardly move, which was not strange, as Thompson says he was under the influence of ether. Why he was in bed or under ether, no one attempts to say. Apparently he had undergone no abdominal operation, for neither of the doctors who testified say anything about finding evidence of any previous operation (both gave careful physical examinations, and one operated for appedicitis—Tr. 62; 64, 70), nor, though plaintiff was rather keen about bringing out history as heard by the doctors, did they say that Dyer gave them a history of operation or even hospitalization; in fact, Dr. Hampton didn't know Dyer had been in a hospital before he was consulted, and would have been interested in the hospital doctor's findings (Tr. 84).

What the trouble was, then, is left to speculation; its extent or degree is left to speculation; its permanency, or possibility with care of cure, is left to speculation; the

effect, if any, of work upon it is left to speculation. But whatever it was, it was proved by plaintiff that it improved. Thompson says at Fort Douglas he saw Dyer occasionally; his face was all drawn, he was stooped and part of the time he walked with crutches; he complained of his stomach. Before discharge he was able to go without a cane (Tr. 45) and after discharge and by the time he went to work on the highway July 14, 1919, he had ceased to use a cane (Tr. 30, 34, 45, 46, 52). Dr. Hampton, the only doctor who gave an opinion relative to degree of disability before lapse of policy, did not give this history any weight in making his diagnosis—he did not know about it—and in answering the hypothetical question by giving an opinion dating total and permanent disability from discharge he gave it no consideration, since no part of it, save walking with a cane and the fact of being in a hospital for two months, was given, or assumed to be true, in the hypothetical question (Tr. 72-82; 84).

Dyer was discharged April 25, 1919; his policy lapsed May 31, 1919 (Tr. 26). Up to discharge no traumatic or other injury has been proven; an indefinite illness, wholly speculative as to kind or degree, has been suggested; from that he very clearly is improving. We will cover the remaining policy period. He returned to his father's home, there or in its vicinity to remain until 1921. He was there the first three months of his return, and his father, who testified, should have best known the outward manifestations of disease. *Yet he was never even asked to describe his physical appearance or alleged*

suffering during the remaining policy period or at any other time (Tr. 27-28). On the other hand, the father does show that he went to work and continued work steadily until in 1921, as a foreman in highway work at a considerably higher wage than others were getting (Tr. 28-29). This evidence plaintiff in his brief chooses to ignore. The father implies that at times Dyer came home from work sick, then would go to work again. But he was not asked to describe the sickness, nor how often it occurred, nor when it occurred, and one can only speculate about it, and about why one who should have been the best informed witness was not asked (Tr. 28).

It was left to others with but casual contact to attempt to describe his condition while the policy was in effect. Dyer is described by Springer, a merchant, as coming home from discharge on crutches or a cane, lighter in weight, bad complexion, pale, and complaining of pains in his stomach. Shortly after that he went to work on the highway and there remained until he went to Oregon (Tr. 30-32); similarly, Jones, a farmer, noticed just after discharge that Dyer was pale, stooped a little, used a cane, favored his side, was short of breath. After that he worked on the highway (Tr. 32-34). Wesley C. Thompson's testimony was similar (Tr. 46). Hoeffer, a farmer, observed at that time that he was sick, could hardly walk around, favored his side, was pale, weak, used a cane. Possibly, though indefinite, it was during this period that Dyer hauled fertilizer and had to stop and rest (Tr. 52-53). It is to be remembered that at this

time Dyer was convalescent from some indefinite, speculative, illness at Fort Douglas. No vomiting appears during this period. No traumatic injury occurred, so far as the testimony showed, *yet the only evidence*—an opinion—*of the totality and permanency of the condition before the policy lapsed is based upon the necessity of actual occurrence of traumatic injury during that time.* For Dr. Hampton, the only witness who tried to date total and permanent disability before policy lapse, in answer to a hypothetical question which assumed *no traumatic injury at all* (Tr. 72-81) based his opinion upon the assumption that Dyer was run over by a truck (which was not proven as a fact), and based his diagnosis when he examined Dyer after the lapse of the policy upon the occurrence of some injury and no injury was proved to have taken place before lapse, nor was it proven that the injury did *not* occur after lapse.

After giving his diagnosis of gastroptosis on July 28, 1919, after the lapse of the policy, the Doctor said:

> "Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?"
>
> A. Yes.
>
> Q. In your oinion did it cause it?
>
> A. Yes." (Tr. 71).

But no proof, as hereinbefore stated, was ever presented that Dyer was run over by a truck before the lapse

of the policy, or that he was *not* run over *after* the lapse of the policy.

Again, as stated, the hypothetical question did not assume as fact the truck injury, but assumed the contrary. Over objection, the Doctor, however, used the incident as controlling.

"Q. You are not to assume as an actual absolute fact that he was run over by a truck, but you can assume that he gave you the history of it.

A. And answer on the history he gave me?

The Court. Yes.

A. I do. . . . .

MR. GRIFFIN. With that modification, may I have the same objection, your Honor, so I may preserve my record?

The Court. Yes, you can have the same objection, and it is overruled.

Q. You say you do. You say he was totally and permanently disabled at the time of his discharge within that definition?

A. Yes, sir.

Q. *And what in your opinion was the cause of his total and permanent disability?*

A. *According to his history, what he gave me, as being crushed by the truck.*

Q. And what evidence, doctor, of an injury of some kind did you find?

A. In giving him a thorough examination, I found his stomach and intestines down low, down in the hypogastric region.

Q. In your opinion was that caused by *some injury?*

A. *Yes, sir.* It was exaggerated more than a common type of gastro-enteroptosis (Tr. 81-82).

On cross-examination, with reference to this opinion, the following occurred:

"Q. You date this trouble, then, from this supposed being run over by a truck, *whenever that happened?*

A. According to his history.

Q. That is what you date it from in your opinion?

A. *I haven't any other way of dating it.*

Q. And you *don't know when* it happened?

A. No, sir.

Q. And *you don't know whether it ever happened,* do you?

A. *Only according to his own* statement.

Q. And you are simply assuming that is a fact?

A. Yes.

Q. And your whole opinion is based upon that being a fact, in fact?

A. On his history and my examination.

Q. Yes, *that is a material factor, is it not, in your determination you made an answer to this hypothetical question?*

A. *That is the way I take it.*

Q. *And if it was out of the question and wasn't a fact, and hasn't been proved as a fact, then there wouldn't be any way for you to date when the trouble started, would there?*

A. *I wouldn't give any date.*" (Tr. 83-84).

On this phase the doctor was produced to testify as an expert, not as a patient's doctor. The very foundation of his expert opinion was the actuality and time of an injury. When the foundation is removed, the opinion falls. The expert attempted to erect his opinion upon an imaginary foundation, neither proven nor assumed to exist, in fact, at any time.

> "A mere guess or statement of a witness, even though a so-called medical expert, predicated upon no evidence or statement before the court to show continuity of condition covering the period of total permanent disability, is of no value. The trial judge can say whether there is substantial evidence to support the hypothetical question, and, therefore the conclusion of the expert."
>
> *U. S. v. Lesher*, 59 F. (2d) 53 at 55 (9th C. C. A.).

"A hypothetical question on which the opinion of an expert is to be based must include only such facts as are supported by evidence."
11 R. C. L., Sec. 11, p. 579.

"It scarcely needs the citation of authorities to sustain the proposition that a hypothetical question calling for expert opinion must be based on facts in evidence."
Phil. & R. Ry. Co. v. Cannon, 296 F. 302, at 306, (3d C. C. A.).
Union Pac. R. Co. v. McMican, 194 F. 393 (8th C. C. A.).

If the question must be based on facts in evidence, certainly the answer cannot be based upon facts neither in evidence nor stated in the question.

The foregoing, we believe, embodies all of the evidence properly assignable to conditions before the lapse of the policy. It shows not only no substantial evidence, but none at all, of an injury before lapse producing gastroptosis (or gastro-enteroptosis) upon which the pleading, and the first doctor (Dr. Hampton) based permanent and total disability; nor any substantial, or other, evidence that the injury responsible for the alleged total permanent disability did not occur between May 31, 1919, when the policy lapsed, and July 28, 1919, when Dr. Hampton discovered the alleged disability, gastroptosis. And it affirmatively shows that whatever condition Dyer was suffering from when he was in the Fort Douglas Hos-

pital, steadily improved without treatment until in July he was able to resume work, did resume work, and continued to work at a gainful occupation, and with substantially gainful returns, until 1928, nine years after the lapse of the policy.

This failure of policy period connection, or policy period totality, or policy period permanence, is alone adequate to support the ruling of the Court. But plaintiff's proof of subsequent history likewise supports it, because it shows (1) that Dyer suffered from a succession of diseases or conditions all arising after the policy lapsed, and (2) he did in fact from July 14, 1919 to the year 1928 engage continuously in substantially gainful occupations, and was neither totally nor permanently disabled.

Nor does this subsequent history disclose a condition unknown during the policy period but in fact then existing. The purpose and value of evidence of subsequent conditions is to show continuance of a total and permanent disability proven to exist in fact before the lapse of the policy, or to

> "disclose *the existence of conditions during the life of the policy not then known or recognized,* which would justify a conclusion that it had been reasonably certain while the policy was in force that the disability would continue throughout life . . . .
>
> " . . . . The subsequent events may be such in point of time or circumstance as to constitute evi-

> dence of the conditions upon which the disability existing during the life of the policy was based, but they are of no importance unless they do constitute such evidence, because they do not of themselves condition the right of recovery under the policy, which must depend entirely upon the conditions which existed when the policy was alive."
>
> *Eggen v. U. S.*, 58 F. (2d) 616, 619.

First, as to succession of diseases after the policy lapsed. In June 1919, he was still getting better—he pitched hay for a while but couldn't go on. Why, or what condition arose is not disclosed (Tr. 33). By July 14th, he had so far recovered as to go to work on the highway as a workman and foreman in form building, working the same hours as the other men, nine hours a day, every work day, to and including July 26th (Tr. 28, 29, 31-32, 33-34; 46; 49-50). July 27th was Sunday. On Monday, July 28, he took sick (Tr. 47) and vomited incessantly (Tr. 70). There is no evidence of vomiting prior to this, except by inference from his bosses' statement that this was the third time he had been sick (Tr. 47). He was taken to Dr. Hampton (Tr. 47, 69) who found him weak, in a debilitated condition, anemic, thin, walking in a stooped position, complaining of pain in the stomach and epigastric region and back, and vomiting. Upon examination the doctor found gastroptosis (gastro-enteroptosis), a dropping down of the stomach and intestines, causing the symptoms, and resulting from some injury (Tr. 70-71; 72; 82). In his opinion he was at the time

he saw him, and thereafter, totally and permanently disabled on account and from the date of the injury (Tr. 71, 72, 82-84). When the injury, or gastroptosis resulting therefrom, occurred, he didn't know (Tr. 83), and no evidence was introduced showing. It is wholly speculative and may have occurred as well after May 31, 1919, as before. In the absence of evidence of its occurrence before, and absence of evidence of its occurrence after May 31, 1919, no foundation, no substantial evidence, exists for dating it prior to lapse. The most that can be said without guessing (and ignoring other factors hereinafter mentioned) is that Dyer was totally and permanently disabled from July 28, 1919, a date subsequent to lapse of the policy.

The doctor put Dyer on a light diet, and used an elastic belt to hold up his stomach as proper treatment and temporary relief. He wore it and worked until 1928 at what the doctor considered a substantially gainful occupation (Tr. 86-94). He considered him nevertheless totally and permanently disabled, not because he could not follow a substantially gainful occupation, but because he should not (Tr. 86, 88, 89, 90). He should not because work would aggravate the condition to the extent of bringing on vomiting and pain (Tr. 83).

He did not say (as in *U. S. v. Sligh,* 31 F. (2d) 735, cited by appellant), that work was "serious peril to the life or health of the insured," or (as in *U. S. v. Acker* 35 F. (2d) 646) would "substantially aggravate the ailment," and the most that can be said is that he would

work under handicap, which is not sufficient to justify recovery.

U. S. v. Seattle Title Trust Co., 53 F. (2d) 435 (9th C. C. A.).

U. S. v. Perry, 55 F. (2d) 819 (8th C. C. A.).

U. S. v. Thomas, 53 F. (2d) 192 (4th C. C. A.).

U. S. v. Wilson, 50 F. (2d) 1063, 1064, (4th C. C. A.).

Hanagan v. U. S., 57 F. (2d) 860 (7th C. C. A.).

U. S. v. Fly, 58 F. (2d) 217 (8th C. C. A.).

And any work performed (as we shall show) was *after* the lapse of the policy, so that if work is claimed to have been the cause either of totality or of changing a temporary total condition into a permanent total condition, the totality or permanency arose out of conditions *not existing* during the policy period, but arising thereafter, and absent the payment of premiums, cannot relate back and mature the policy.

Eggen v. U. S., 58 F. (2d) 616 (8th C. C. A.).

Nicolay v. U. S., 51 F. (2d) 170 (10th C. C. A.).

Roberts v. U. S., 57 F. (2d) 514 (10th C. C. A.).

Hirt v. U. S., 56 F. (2d) 80 (10th C. C. A.).

The most that *U. S. v. Sligh,* 31 F. (2d), 735, decided by this court, and other similar cases, can be construed to hold is that one who can work only at peril to life during the policy period is *totally* disabled; that is, that total disability may consist of (1) actual physical or mental inability, or (2) physical or mental disease of such a character that, though the sufferer is in fact able to work,

work will aggravate the condition to the peril of life or health. But the matter of permanency is not thus settled. It also must occur during the life of the policy, so that if, by treatment or proper care the condition may be ameliorated, i. e., is temporary, during the policy period, *it cannot be rendered permanent by conditions, for instance, work performed, arising afterwards.* Eggen v. U. S., *supra;* Nicolay v. U. S., *supra;* Roberts v. U. S., *supra;* Hirt v. U. S., *supra.*

In 1926, Dr. Hunt actually opened up the abdomen and could therefore *see* the conditions; he says nothing about finding gastroptosis or gastro-enteroptosis, but describes other conditions. These we will consider hereafter. In 1928 (the doctor testifies without notes and from memory, 1927 and 1928, but the other evidence makes it certain that Dyer was not in Idaho in 1927) Doctor Hampton again treated Dyer, found the same condition, gastroptosis, resulting from an injury, only worse (Dyer had accidents in 1926 and 1927—Tr. 65-66), considered him then total and permanent (Tr. 71-72, 90). In 1928, he sent Dyer to the Boise Veterans Hospital, for what condition the evidence does not disclose, and again we can only speculate (Tr. 94-95).

Continuing the history of his disabilities: During his work, from 1919 to 1921, he had spells of vomiting, some of which did and some did not lay him up. He also got sores in his mouth (Tr. 48-49). He was lighter in weight than before service, pale, limped (Tr. 35, 39, 54). From 1921 to 1928, he worked at the same work, or at con-

tracting, in Oregon. His partner, who was with him practically all the time from his discharge until a year before his death (Tr. 35, 39) first saw him too sick to work, at Roseburg, Oregon, in September 1922, at which time he had a sort of paralytic stroke, took an awful pain in the back, became almost paralyzed (Tr. 37, 39, 56). This is the first description of this sort of condition; another occurred in 1923, and another in 1927 after he fell off a scaffold (Tr. 37, 39, 55). The first time he consulted a doctor was in 1923 (Tr. 40). In 1926 he also fell from a scaffold and was treated by Dr. Hunt after which he complained of his back (Tr. 39, 40, 65, 66). During the partnership, he had vomiting spells (Tr. 38) and his partner's opinion was that about every 6 months he should have gone to the hospital or had a doctor's care (Tr. 39). After 1923 he consulted some doctors (Tr. 40). Dr. Hunt found a new set of conditions in 1926. He did not attempt to fix their origin or time. He first treated him for *nervous unrest* in February, 1926, seven years after lapse of the policy. Dyer gave a history of nervous difficulty since service (Tr. 62); he did not give such history to his first doctor, Dr. Hampton, and none of the witnesses, including Dr. Hampton, describe any such condition before 1921. To Dr. Hunt he also complained of weakness and general debility (Tr. 64). The doctor gave him a complete physical examination, and found *pyorrhea of the gums* (gingivitis), exuding pus or poison into the system, which was sufficient cause for his condition, and which he treated (Tr. 62, 64, 65). He consid-

ered Dyer totally disabled during his acquaintance, over a period of six months (Tr. 63, 67, 62). The doctor was not asked if Dyer was permanently disabled. When the pyorrhea began, no one knows—it is not pleaded—and again we speculate about a new disease.

About July 28, 1926, Dyer, while wheeling concrete on a scaffold, fell off, was injured, taken to the hospital, suffering superficial cuts and bruises and a sprained shoulder and back (Tr. 65-66). While in the hospital, on August 2, 1926, Dr. Hunt operated for acute appendicitis, the result of localization of general infection of the alimentary tract, superinduced by a sluggish circulation through that portion of the bowel, and very likely contributed to by Dyer's enforced rest in bed. The condition of bowel stasis induced by adhesions that have been the result of internal injury may have produced a predisposition to appendicitis (Tr. 63, 64-66, 68). Appedicitis is not pleaded (Tr. 13), and is not claimed to have existed during the policy period.

But Dr. Hunt opened up the abdomen in the operation, and he says nothing of seeing the alleged gastroptosis of Dr. Hampton—the dropping down of stomach and intestines which one would expect to be observable. He did find adhesions, which were pleaded, but when they arose no one says. Again we speculate. In any event, they were of no medical importance, according to the doctor, who left them alone, except they may have induced a bowel stasis, predisposing to the appendicitis (Tr. 62, 63, 65, 66). At the operation, hyperacidity and chronic

indigestion were also first discovered—their inception or effect was not testified to (Tr. 62) and we continue our speculation. Perhaps these are the conditions pleaded as "hypochlorhydria" and "ileo caecal stasis", though no one says so.

We reiterate that so far as the evidence shows, Dyer's conditions were successive, different diseases or illnesses, most if not all arising subsquent to the policy period, and none, we expect hereafter to demonstrate more fully by his work record, reaching the stage of totality and permanency, either before or after policy lapse, justifying recovery. At most they constituted handicaps only. Taking them up as alleged: (1) crushing by a truck was not proved at any time; no injury during the policy period was proved by any evidence; lack of injury after the lapse of the policy and before the first diagnosis was not proven by any evidence; evidence of injuries in 1926 and 1927 was proven, but they were long after lapse of the policy; (2) exposure to the elements and suffering from the lack of shelter, food and water were not proven by any evidence; (3) the condition at Fort Douglas hospital before discharge was never defined, its degree or permanency was never established, and it was not pleaded—it was proved that it improved to an extent permitting steady labor; (4) hernia was never proved; (5) adhesions were proven in 1926, after lapse of policy, and duration never established—it was proved they were of little physical importance; (6) hypochlorhydria was never proved as such—if hyperacidity is the same, it was first noted in

1926, its degree and permanence not established; (7) ileo caecal stasis was not proven as such—if it is the same condition mentioned by Dr. Hunt, it was first noticed by him in 1926, and its degree and permanence not established; it and hyperacidity apparently resulted from pyorrhea, not pleaded, and date of origin not established; (8) gastro-enteroptosis, first diagnosed June 28, 1919, after lapse, by Dr. Hampton, as gastroptosis, thought to be of traumatic origin, and no injury date established within the policy period; not found on visual inspection at the operation in 1926; said by Dr. Hampton to exist in 1928; not established as total permanent except by the opinion of Dr. Hampton which is shown did not have the proper basis for totality under the decisions of the Court under the "perilous work" doctrine, and is contrary to physical facts in evidence, that is, the record of work; (9) hyperthyroidism, not proven by any evidence; and (10) pharyngitis, not proven by any evidence.

Lastly, the death of Dyer. Apparently the appellant desires some inference drawn from his reiteration that Dyer "worked and died" (Brief, pp. 9, 47, 52, 53). But there is no *evidence* of cause and effect, no evidence upon which to base legal inference, nothing but speculation as to cause of death; there is no explanation why evidence, in place of surmise, was not supplied. It was stipulated that he died May 1, 1929 (Tr. 26); his father testified that he died at Boise (Tr. 28), but there was no evidence of cause of death, and whether from some acute condition

or from some condition of long standing, whether induced by labor or the result of infection or contagion, no one testified.

Now, his record of employment. Beginning July 14, 1919, he worked with regularity, occasionally ill but how frequently or how protracted, not testified to, save that in a period of nearly two years (July 14, 1919 to April 1921, when he left for Oregon), he was observed in from 20 to 25 illnesses, some of which lasted a few hours, some longer, the period not stated, but from each of which he returned to work, first as a concrete form builder on highway construction, shortly as foreman, and always getting at least 15 cents an hour more than others, earning 65 cents to 75 cents an hour, working nine hours a day, in Bingham and Bonneville counties in Idaho. He was a very competent workman. On his first boss's (W. C. Thompson) recommendation, and after the diagnosis of Dr. Hampton, he was hired as a foreman at 75 cents an hour by another man, and handled a crew just the same as Thompson (Tr. 29, 32, 33-34, 46-51). The only time book produced showed work for the same hours as other men (Tr. 49-50). We have only a pure guess as to time off.

> "Q. And how about his being on the job or off it during the time he was working for you from 1919 to 1921?
>
> A. *I couldn't say,* but I would say that at the time we were at work, he would be off one fourth of the

time with this sickness. I would say about one fourth. *I couldn't tell you* exactly." (Tr. 48).

His father, with whom he made his home, and who should have known, neither said anything about it nor was he asked (Tr. 27-29). Thompson knew of his being sick only once for three or four days while Dyer worked for 5 months in Bonneville County (Tr. 48). His boss, Stone, in that county, did not testify (Tr. 51). Thompson only recalled one, perhaps two, sicknesses preventing work, from the fall of 1920 to April 1921 (Tr. 51), another period of several months. It is obvious that the periods of illness were only occasional and neither prevented working for any protracted times, nor were such as to prevent his employers continuing him in employ as a foreman over other men. At most he was handicapped somewhat, but certainly he was not totally disabled.

In 1921 he went to Oregon in the same capacity (Tr. 55). From 1921 to 1923, the work record is sketchy—he apparently worked at the same work, but certainly there is no evidence that during this period he did *not,* or could *not,* work, or even that he did work under handicap. There is no justification in the evidence for saying that during this period he was totally disabled, or that he was even handicapped, and absent proof to the contrary, we are entitled to a presumption that he did engage continuously in substantially gainful occupations. Nor is the presumption without support in the natural and proper inferences to be drawn from the fact of his marriage in 1923 (Tr. 54) indicating Dyer's own estimate

of his ability to support his wife, an estimate proved true by the evidence (Tr. 55-56), and from the fact that Gardner, who must have known his capacity because with him practically all the time from August 1919 until a year before his death (Tr. 39), entered into an equal basis contracting partnership in 1923, which continued until 1928 (Tr. 39; 41) indicating that his intimate associate considered him a desirable associate, able to contribute equally with himself. No other motive for entering into this arrangement appears from the evidence; lacking other compelling reasons, common experience teaches that men do not take totally and permanently disabled persons into equal partnership, especially where the partnership, as in highway subcontracting, contemplates physical and mental effort and labor.

We believe we are justified in saying that the evidence of plaintiff shows that Dyer from July 14, 1919 to 1923 could and did continuously follow a substantially gainful occupation, and certainly lacks substance to show that he could or did not.

So also from 1923 to 1928. The partnership engaged as subcontractors in concrete and form work on highways, continued in 1923, 1924, 1925, 1926 and 1927, on a 50-50 (equal division) basis, and as a profitable enterprise, for Dyer and his wife lived in the camps, their bills were paid by the partnership before division of the partnership profits, and Dyer's share of profits amounted to at least $2,000.00 each of these years. *Dyer made a liv-*

ing for himself and family for five years and in addition at least $2,000.00 *per year.* We say at least, because by inference in 1926 and 1927 more was made, since he made income tax returns those years, and he had the high exemption due a man with wife and child (Tr. 38, 39, 40-41; 55-56, 59). The partnership employed from 5 to 20 men, the partners doing the jobs that required special skill and high priced labor. Dyer was a very skillful carpenter, a very efficient workman, the only man on the job who could do certain things; Gardner handled the men principally and looked after the business in a general way (Tr. 58). They had many contracts (Tr. 59), most of the time under Mr. Dunn, for five years (Tr. 61).

During these years, the first time he was too sick to work was in September 1922, at Roseburg, Oregon; other occasions were in 1923 and in 1927, when he fell from a scaffold (Tr. 37; 39), another resulted from falling off a scaffold and appendicitis in 1926 (Tr. 39; 65-66). His partner, who appears to have known the most about him, *estimated* a total of but one year out of the nine, from discharge to 1928, when Dyer was sick in bed (Tr. 37), and under doctor's care a fourth of the time (Tr. 38), separated into occasions therefore, about once in six months (Tr. 39). From some of these periods must be deducted the special situations not attributable to any condition existing before lapse of the policy, namely, the gastroptosis found by Dr. Hampton in 1919; the pyorrhea found by Dr. Hunt for which he was treated some months; the fall from the scaffold in 1926; the appendici-

tis operation with attendant necessary recuperative period; the adhesions, hyperacidity and chronic indigestion; the falling from a scaffold in 1927.

The nervousness during partnership of which Gardner speaks (Tr. 37) was attributable to a non-policy period condition of pyorrhea (Tr. 63). Gardner and his wife speak of vomiting spells and limping and complaining of his back (Tr. 38, 40, 55). Dunn saw him nearly every day, but never saw him vomit (Tr. 60, 59).

The weight to be attached to lay opinions is illustrated by Dunn's diagnosis of kidney trouble, concerning which no doctor testified (Tr. 57-58), and his estimate that Dyer worked half the time (Tr. 58), when Dunn sometimes didn't see him for a week, couldn't tell whether he worked an entire day or not, couldn't say how long he was under doctor's care (Tr. 60), wouldn't know if he was off any extended length of time, he could be off part of a day and Dunn wouldn't know it, and Dunn could give no extended periods he was off (Tr. 61).

During this period, Dyer knew that if entitled he could get compensation from the government—he never made claim (Tr. 40); he never claimed his insurance, and he did draw several months compensation from a private company as a result of falling off a scaffold (Tr. 66-67).

We submit that the period from 1923 to 1928 can be added to the period of 1919 to 1923, and shows the continuous following, broken by occasional nonpolicy period

illness such as any person may suffer, and perhaps with some handicap, of a very substantially gainful occupation. We submit that the guesses and opinions of witnesses are unsubstantial in view of the physical facts.

> " 'When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it.' . . "Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments cannot and should not stand if they are entered upon testimony that cannot be true."
>
> *Woolworth Co. v. Davis*, 41 F. (2d) 342, 347, 8 A. L. R. 798.
>
> *Nicolay v. U. S.*, 51 F. (2d) 170.
>
> *U. S. v. McGill*, 56 F. (2d) 522, 524.
>
> *U. S. v. Crume*, 54 F. (2d) 556, 558.

So the rule in *U. S. v. Hairston*, 55 F. (2d) 825, at p. 827, is applicable:

> "If appellee had conceived himself to be totally and permanently disabled in 1919, he would hardly have waited until 1929 to bring action on the policy. The case apparently is an afterthought. . . . "

Of especial significance is the rule of this Court:

> "(The wife's) testimony consists largely of general statements as to the nervousness, irritability, and

various idiosyncrosies and eccentricities of the insured. The jury were no doubt justified . . . . in concluding that these symptoms were manifestations of the progress of the disease . . . *In view of the fact that during most of this period, the insured was actually engaged in working continuously at a gainful employment, the fact that his health was impaired does not indicate his total inability to perform such labor. U. S. v. Barker,* 36 F. (2d) 556; *U. S. v. Rice,* 47 F. (2d) 749."

U. S. v. Seattle Title Trust Co., 53 F. (2d) 435 at p. 437 (9th C. C. A.).

" . . . . it is to be conceded that, starting with the original infection of the inner ear while plaintiff was in the service, and as a consequence thereof he has suffered more or less from time to time with headache, nausea, and dizziness, and has had some fainting spells, there is a partial paralysis of one side of his face resulting from the second operation, and that the hearing of one ear is seriously impaired, . . . at the time the original policy lapsed he was not free from the infirmity . . . and that he has never fully recovered . . . and that as a consequence he has always been under a measure of disability and to some extent the disability will be permanent. *But upon the conceded facts we think it must be held as a matter of law that such disability was not at the time the policy lapsed, if ever, a total disability* . . . to hold total disability would be to do violence to any

common or reasonable understanding of the meaning of these terms."

U. S. v. Barker, 36 F. (2d) 556 at pp. 558, 559, (9th C. C. A.).

" . . . we have no desire to minimize the suffering and inconvenience resulting therefrom (service connected injuries). But we feel constrained to hold that *manual labor performed* by the appellee *for the period of five years following his discharge from the army and the compensation received for his services are utterly inconsistent with his present claim that he was totally and permanently disabled before the policy lapsed.*" . . .

"The foregoing undisputed facts would seem to demonstrate that there was a total failure of proof * a finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years is without support in the testimony. In so deciding we are not invading the province of the jury, we are simply declaring the law."

U. S. v. Rice, 47 F. (2d) 749 and 750 (9th C. C. A.).

In the foregoing cases, the claimed cause of disability was connected with the policy period; in this case it was not.

See also:

U. S. v. Wilson, 50 F. (2d) 1063, 1064 (4th C. C. A.).

U. S. v. Perry, 55 F. (2d) 819 (8th C. C. A.).
U. S. v. Thomas, 53 F. (2d) 192 (4th C. C. A.).
Hanagan v. U. S., 57 F. (2d) 860 (7th C. C. A.).

In the cases cited by appellant (*U. S. v. Lesher,* 59 F. (2d) 53; *U. S. v. Lawson,* 50 F. (2d) 646), the work was not really that of insured, but of his friends. No such evidence appears in this case. The facts in *U. S. v. Burke,* 50 F. (2d) 653, are entirely different from those here.

The trial court was not only justified in directing, but compelled by the facts to direct, a verdict for defendant.

THERE WAS NO PREJUDICIAL ERROR IN REJECTION OF EVIDENCE.

Complaint is made to the sustaining of objections to certain questions. Without conceding any error in these rulings, there was certainly no prejudicial error.

The witness Beulah Gardner was asked "Did he appear to be a sick man or a well man?" Objection was as follows:

> "Object to that question as leading, and furthermore, as conclusion of the witness. She could state how he appeared to her." (Tr. 54).

This was sustained. The question was leading, and did call for a conclusion. The witness did state elsewhere how he appeared to her, including that he was sick. She was capable of describing, and did describe, the external

manifestations of his condition, in detail, from which the jury could formulate the conclusion, which was their duty, not the witness's. She testified that Dyer "didn't look to be very strong, and he was nervous and pale, had a bad complexion. Sometimes his appetite was good and other times it wasn't good. When he would be sick, he wouldn't have any appetite at all. * * *lost considerable weight. He appeared to be exhausted * * tired easily when he worked. He did not engage in social activities to speak of. His color was pale—yellow. * * became worse * * * shaky * * did light work * * worked not more than one-half of the time * * tried to work and couldn't * * come in completely exhausted * * get completely out and be sick in bed for days * * sick in bed close to eighteen months * * in bed at home lots of times. He was under the doctor's care possibly about a year. I saw him taking medicine. I have seen him vomit —he would vomit blood * * couldn't hardly stand he would shake so. He walked like an old man * * always complained of his back and stomach." (Tr. 54-55). "condition grew worse * * wasn't able to do anything * * in the hospital at Boise for nine months." (Tr. 56).

Certainly this witness would have added nothing to the detailed *facts* by her opinion. Plaintiff was not prejudiced.

The witness John Gardner was asked, "What was his color, was it healthful, or otherwise, after he got out of the army?" Objection that the question called for a conclusion was sustained.

This witness had already described Dyer's color: "I saw him in August of 1919 after his return from the army. His physical condition looked to be very poor. He was pale." (Tr. 35). Later he testified, "He appeared to be a sick man." (Tr. 36). "There was a weakness in his condition, he was pale." (Tr. 39). In addition, the witness described other physical signs (Tr. 35-42). Nothing of value to the jury could possibly have been added by his conclusion, that a sick man who was pale, had an unhealthy color. There was no prejudice in the ruling.

The statement of witness Springer, "He looked like a sick man," was stricken as a conclusion (Tr. 30). This was only doing what counsel had himself asked: "Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. *Don't state any conclusions.*"

> "A. He was either on crutches or had a cane. * * He was much lighter in weight * * his complexion was bad and he looked like a sick man." (Tr. 30).

In view of counsel's own admonition of the witness, the answer might properly have been stricken as not responsive. This witness also was capable of describing and did describe Dyer's physical appearance from which the jury might draw its own conclusions. He testified that Dyer was on crutches, lighter in weight, bad complexion, pale, complained of pains in his stomach, never regained his

weight, had sores around his mouth, had weakness, coughing, short of breath, had to sit down and rest (Tr. 30-31).

Witness Dyer was asked "Did he work?" to which reply was "He helped around with me. *He wasn't able to go on.*" The italicized portion was stricken as a conclusion. It was a conclusion. In addition, it was not responsive, nor was it a conclusion in accord with the facts testified to by the witness, who stated that Dyer did go to work and worked "all that summer" as a foreman on the highway at higher than average wages, and continued as long as there was any road building in 1919; also in 1920 and 1921 (Tr. 28-29). He was never asked to describe any physical condition, either by statement of fact or conclusion; he was asked merely if Dyer worked, and his testimony fully covered the subject of the question. There was no prejudice in the ruling.

We submit that none of these rulings prejudiced the plaintiff. The witnesses described conditions observed, facts from which the jury, as was its right, could readily reach its own conclusions, and in which it would not be assisted by the conclusion of the witness. In addition, these matters were merely cumulative, others having fully described conditions. What Dyer looked like, sick or well (Tr. 28, 33, 35, 36, 37, 48, 49, 51, 58), what his color was, (Tr. 31, 33, 35, 39, 47, 52), whether he was able to work (Tr. 31, 33, 36, 37, 40, 41, 51, 52, 53, 54, 56, 58, 60, 63), were all testified to.

The rule permitting in exceptional cases the expression of opinion by non-expert witnesses was not applicable to the foregoing questions. The cases cited by appellant are not analagous: *Baltimore & Ohio R. Co. v. Rambo,* 59 Fed. 75, involved involuntary expressions of pain, admitted as verbal acts, and as

> "an inference from many minor details which it would be impossible for him to present in the form of a picture to the jury except by the statement of his inference or opinion."

Certainly the question of healthfulness of color, as asked John Gardner, does not meet this test. Nor since the exception is a rule of necessity, based upon inability to communicate to others a multitude of detailed conditions, many of which may be indescribable, is it applicable where conditions seen can be, in fact, described and communicated.

The case of *Parker et al v. Elgin,* 5 F. (2d) 562 cited by appellant involved an opinion on the peril of boys 500 feet from a street car. The Court held the opinion inadmissible and called attention to the necessity that it be "impossible to reproduce or describe in words every detail upon which the opinion of the witness is perdicated."

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612, *Mutual Life Insurance Company v. Leubrie,* 71 Fed. 843, and *Turner v. American Security & Trust Company,* 213 U. S. 257, cited by appellant, all relate to opinions on sanity, a well recognized exception;

Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, and *Fireman's Ins. Co. v. Mohlman Co.,* 91 Fed. 85, are fire insurance cases, the first being opinion on the time a roof fell, which was not allowed, the second being an opinion by experts as to when a building fell. The first points out that the matter is one of discretion in the trial court, and the danger of extension of the exception.

> "One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. *The trial court sees and hears each witness, and in doubtful cases is far better qualified than the Court of Appeals to determine whether a witness should be confined to the facts, or should be allowed to state his conclusions.*"
>
> *Kiesel & Co. v. Sun Ins. Co.* 88 Fed. 243, 249 (8th C. C. A.).

Applying that rule, the court did not here abuse its discretion in view of the descriptive ability of all the witnesses, except the witness Charles Dyer (Tr. 27), whose answer was gratuitous, not responsive, contrary to facts testified to by him, and without attempt made to ascertain whether he could or could not describe conditions observed. Certainly it would be a dangerous practice to permit such opinions without a statement, as detailed as

possible for the witness to give, of the conditions observed upon which an opinion is based, and if the witness can, as here, describe conditions observed, the jury, to which is entrusted the duty of finding the ultimate conclusion, can do so without its province being invaded by the witness, whose opinion can add nothing to the facts described.

As further stated in the case last above noted, and cited also by appellant,

> "The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule, or under one of its exceptions, the wise course is to place it under the rule; and, in our opinion, the court below made no mistake in following this course in the case before us."
>
> *Kiesel & Co. v. Sun Ins. Co.,* 88 Fed. 243, 249, (8th C. C. A.).

The questions and answers were properly excluded and there was no error therein; their exclusion was without prejudice because the witnesses, and other witnesses, described conditions, and their opinions and conclusions could add nothing of fact, and could but invade the function of the jury.

Lastly, there was no prejudice because assuming that the witnesses had been permitted to say that Dyer's color was unhealthful, that he was sick and that he was unable to work, it could not have changed the result of the facts in evidence upon which the Court determined correctly that a verdict should be directed for the defendant. These opinions would not constitute substantial evidence supplying the deficiencies of the proof to establish permanent total disability, nor overcoming the proof establishing ability to follow continuously substantially gainful labor, as more fully reviewed heretofore in this brief.

Respectfully submitted,

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